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STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0629

BARRY ALONZO HEATH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade, The Honorable Thomas M. McKittrick, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
LISA S. KORCHINSKI
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR PETITIONER
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
DEBORAH F. BUTLER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

ATTORNEYS FOR RESPONDENT
AND APPELLEE

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Appellant Heath respectfully submits this reply to the Appellee's brief.

I. THE STATE'S RESPONSE PROVIDED NO ANALYSIS OR ARGUMENT SUPPORTING THE DISTRICT COURT'S DENIAL OF HEATH'S PETITION FOR POSTCONVICTION RELIEF.

In its response, the State does nothing to argue the issues raised by Heath. The State only regurgitates the district court's findings of facts and conclusions of law stating they are correct with no further analysis. This Court should disregard the State's response brief as it is unresponsive to the issues raised by Heath. Further, Heath will only reply to a few of the statements made in the State's response, as a second regurgitation by Appellant is unnecessary.

A. Reenactment

The State misinterpreted, and misleads the Court, that Heath wanted a reenactment of (the impossibility of) Dansereau squeezing his balls. (Appellee's Br. at 20-21.) Heath wanted a reenactment of the struggle leading up to the alleged crime. The alleged struggle occurred in a small kitchen and was supposed to have been very rough, if not downright violent. If this was true, then the kitchen would have been destroyed. The cluttered counters would have been cleared and debris scattered on the floor, the boxes on the floor overturned and the dog food and water bowls spilled. (D.C. Doc. 1 at Ex. F, photos of kitchen.) None of this occurred and a reenactment of the struggle would have shown the struggle did not happen the way Dansereau claimed. (Appellant's Br. at 10-11.)

B. Representation Conflict

Although the district court found Heath lacked credibility regarding this issue, again, it is interesting the district court also failed to acknowledge Heath's witness on this issue: Fr. Nyquist. (4/16/09 Tr. at 4-6.) Fr. Nyquist testified at the evidentiary hearing that he had met Heath while performing prison ministry. Fr. Nyquist took out a personal bank loan in order to obtain counsel for Heath. Fr. Nyquist testified that had he known, or learned, of Hudspeth's former representation of the victim's brother, he never would have secured Hudspeth to represent Heath. (4/16/09 Tr. at 5-6.) In its conclusions of law, the district court stated, Heath did not show how the outcome of the trial would have been different. (D.C. Doc. 31 at 46.) However, Hudspeth's prior representation and failure to inform Heath goes to his lack of reasonable defense in this case. Further, Fr. Nyquist's testimony proves that a different outcome at trial would have occurred: a different attorney would have been retained.

C. Legal Authority Properly Cited

The State asserts that Heath's argument for a new trial did not cite legal authority for this action. (Appellee's Br. at 27.) This is false. In his opening brief, Heath argued he was denied effective assistance of trial counsel (Hudspeth) through cumulative errors. Cumulative error requires a reversal of a conviction because, taken together, the errors prejudiced Heath's right to a fair trial.

(Appellant's Br. at 18, *citing State v. Ferguson*, 2005 MT 343, ¶ 124, 330 Mont. 103, 126 P.3d 463.) Further, "where there has been a finding of ineffective assistance of counsel . . . the remedy should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Gordon*, 156 F.3d 376, 381 (2nd Cir. 1998) (*quoting United States v. Morrison*, 449 U.S. 361, 364 (1981)). "The remedy is one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Carmichael*, 216 F.3d 224, 227 (2nd Cir. 2000). Here, Heath was denied effective assistance of counsel prior to and throughout trial, therefore, a new trial is required. The State's allegation that Heath's appellate counsel did not cite authority for her argument is "inane and fruitless" and should be disregarded by this Court.

II. HEATH HAS A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN APPOINTED FOR POSTCONVICTION RELIEF.

In its response the State argues there is "no constitutional right to counsel in a post-conviction proceeding and, therefore no ineffective assistance of counsel claim can be raised regarding Avery's and Stephens' performances in his post-conviction proceedings." (Appellee's Br. at 4, 28, *citing Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *In re Martin*, 240 Mont. 419, 420, 787 P.2d 746, 747 (1989); *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (pin cites not provided by the State). However, pursuant to Montana statutory law, if a postconviction relief

hearing is required, or in the interests of justice so require), the court ***shall*** order the office of the state public defender to assign counsel. Mont. Code Ann. § 46-21-201(2). Here, the Montana Supreme Court reversed the denial of Heath's petition for postconviction relief and remanded for an evidentiary hearing. *State v. Heath*, 2009 MT 7, ¶ 28, 348 Mont. 361, 202 P.3d 118.

Heath may not automatically have a ***right*** to counsel in his postconviction proceedings, but the fact remains that Heath ***had*** counsel (once an evidentiary hearing was required by this Court) and counsel was appointed by the State. Once represented by counsel, whether or not state-appointed, Heath's counsel was bound by the Montana Rules of Professional Conduct to provide competent, prompt and diligent representation. Mont. R. Prof. Cond. 1.1; *see also*, Preamble § 5. Counsel was obligated to advocate and assert the client's position under the rules of the adversary system. Mont. R. Prof. Cond., Preamble § 3. Avery and Stephens accepted the case and undertook Heath's representation in the postconviction relief proceedings and were thereby bound to provide competent representation.

Heath has not overlooked the *Strickland* presumption in favor of counsel's effectiveness. *State v.Whitlow*, 2008 MT 140, ¶ 21, 343 Mont. 90, 183 P.3d 861 (*citing to Strickland, internal citations omitted*). Avery and Stephens failed to properly amend the original petition as statutorily required, and Stephens failed

to call witnesses at the hearing, relying only on Heath's unsupported claims and allegations. Avery and Stephen's advocacy fell below the standard required under the Sixth Amendment and clearly resulted in actual prejudice against Heath's substantial rights.

As in *State v. Denny*, 262 Mont. 248, 252-53, 865 P.2d 226, 228-29 (1993), Avery's and Stephen's failure to advocate Heath's position and gain affidavits and witness testimony crossed the line between strategy and reasonable actions. As this Court has stated, a "complete failure to investigate . . . can hardly be considered a tactical decision" and as such "counsel was not functioning as the counsel guaranteed the defendant under the Sixth Amendment." *Denny*, 262 Mont. at 253, 865 P.2d at 229 (*citing Strickland v. Washington*, 466 U.S. 668, 687).

Respectfully submitted this ___ day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

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By: _____
LISA S. KORCHINSKI
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
DEBORAH F. BUTLER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

BARRY HEATH
1831 Euclid Avenue
Helena, MT 59601

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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LISA S. KORCHINSKI